Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:	)	
	)	
Modifying the Commission's Process to Avert	)	
Harm to U.S. Competition and U.S. Customers	)	IB Docket No. 05-254
Caused by Anticompetitive Conduct	)	

To: The Commission

COMMENTS OF THE CARIBBEAN ASSOCIATION OF NATIONAL TELECOMMUNICATIONS ORGANIZATIONS ("CANTO")

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COMMENTS OF CANTO

I. Introduction and Summary

The Caribbean Association of National Telecommunications Organizations ("CANTO") hereby submits these comments in response to the *Notice of Inquiry ("NOI")* issued by the Commission in the above-referenced docket.1/ CANTO is an industry association representing some 50 Caribbean telecommunications operating companies from 29 countries.2/ A member of the International Telecommunication Union ("ITU"), CANTO was formed with the mission of facilitating the provision of quality communications services to promote the regional, economic, social and cultural development of the Caribbean Region. CANTO was an active participant in

1/ *Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct*, IB Docket No. 05-254, Notice of Inquiry, FCC 05-152 (rel. Aug. 15, 2005) ("*NOI*").

2/ The positions advocated by CANTO in these comments are those of the association as a whole, and not necessarily the position taken by each CANTO member. CANTO's member carriers operate in the following countries or territories: Anguilla; Antigua/Barbuda; Aruba; Bahamas; Barbados; Belize; Bermuda; Bonaire; Cayman Islands; Cuba; Curacao; Dominica; Dominican Republic; Grenada; Guadeloupe; Guyana; Haiti; Jamaica; Martinique; Monteserrat; St. Kitts/Nevis; St. Lucia; St. Maarten; St. Vincent & the Grenadines; Suriname; Tortola (B.V.I.); Trinidad & Tobago; Turks & Caicos; and the U.S. Virgin Islands.

the Commission's recent *ISP Reform* and *Foreign Mobile Termination* proceedings,3/ and incorporates its filings in those dockets by reference.

Market and technological developments in recent years have exerted significant downward pressure on foreign termination rates and have provided carriers with a number of alternative methods for the delivery of international traffic.4/ The resulting lower rates and burgeoning competition prompted the Commission to release its *ISP Reform Order* last year to promote further market flexibility. Indeed, like the majority of international routes, virtually all routes between the U.S. and CANTO member countries have now been exempted from the ISP, based on their benchmark-compliant status. The *NOI*, however, focuses on a small number (only four are cited) of instances where U.S. international carriers have alleged anticompetitive behavior by foreign operators.

CANTO urges the Commission to resist calls for the imposition of unilateral policies that would effectively provide U.S. carriers with precisely the same type of unfair negotiating leverage that the Commission seeks to counter from foreign carriers with market power. The Commission should recognize that, on benchmark-compliant international routes, service terminations and/or suspensions pursuant to contractual terms may be a legitimate, albeit last resort, option for foreign international carriers where there is failure to reach commercially reasonable or economically sustainable agreements with U.S. international carriers regarding the settlement of traffic. Where the Commission is concerned that the settlement rate being requested

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3/ *International Settlements Policy Reform*, IB Docket No. 02-324, First Report and Order, 19 FCC Rcd 5709 (2004) ("*ISP Reform Order*"); *Effect of Mobile Termination Rates on U.S. Customers*, IB Docket No. 04-398, Notice of Inquiry, 19 FCC Rcd 21395 (2004) ("*Foreign Mobile Termination NOI*").

4/ *ISP Reform Order* at ¶ 23 (citing practices such as re-file and re-origination, as well as Voice Over Internet Protocol ("VOIP"), that provide carriers with lower-cost alternatives to traditionally-settled international traffic termination).

by a foreign carrier is not sufficiently cost-justified, the Commission should raise its concern with the national regulatory authority ("NRA") that has legal authority over the foreign carrier, or in the appropriate international forum, rather than unilaterally halting payments owed to the foreign international carrier. As noted previously by the European Commission in the Commission's ISP docket, "the … pro-competitive regulation of telecommunications services in third markets must be achieved not by unilateral action but by negotiations between countries, primarily in the multilateral framework of the WTO, and by a policy of assistance toward other countries to reform their telecommunications regulatory environment as exemplified by the international co-operation that takes place in the ITU."5/

II. The Commission Should Not Impose Regulations That Make It Impossible for Foreign International Carriers to Satisfy Their Financial Commitments or Use Its Authority to Give U.S. Carriers an Unfair Negotiating Advantage

As the Commission explained in its *ISP Reform Order*, the settlement rate covers the bundled provision of: (1) an international half-circuit; (2) international gateway switching; and (3) domestic termination.6/ It is important to understand that in many cases, the foreign international carrier (*i.e.*, the carrier having a correspondent relationship with the U.S. international carrier) does not itself provide the third component, but instead pays a domestic fixed or mobile carrier for this service.7/ Such is the case for many CANTO members.

5/ Reply Comments of the Delegation of the European Commission, filed in IB Docket No. 02-234 (Feb. 14, 2003) at 1. *See also id.* at 2 (expressing "firm opposition" to FCC unilateral action regarding settlement rates).

6/ *ISP Reform Order* at n.3.

7/ The Commission recognized this concept with regard to mobile terminations in its *Foreign Mobile Termination NOI*, at ¶ 3. The same concept applies to fixed networks in competitive markets where there are multiple international carriers and/or domestic fixed providers.

When these domestic termination rates increase – for whatever reason – it is not unreasonable for the foreign international carrier to pass these costs along, just as the provider of any product or service must eventually raise its prices to cover increases in the wholesale cost of a major input component used to provide the product or service. Any suggestion that a foreign international carrier must continue to provide service at the same settlement rate without regard to its costs leads to the untenable result that such carrier must operate the route at a loss.

The Commission has recognized that a carrier's inability to provide a service at a profit constitutes grounds in favor of discontinuing such service.8/ Indeed, in the domestic U.S. context, courts have held that "a regulated carrier cannot be compelled to continue to operate at a loss."9/ Because CANTO's members are in the business of *providing* service, not turning away business (and revenues) by blocking circuits, they have the strongest incentives to reach commercially reasonable agreements with their U.S. counterparts regarding the settlement of international traffic. Nevertheless, in situations where negotiations have failed and where the provision of service under terms insisted upon by U.S. international carriers is not economically viable, CANTO's members should, as a last resort, at least be able to act rationally by discontinuing service to any carrier, provided that reasonable notice is given.

Under the policies contemplated in the *NOI*, U.S. carriers could be ordered by the Commission to stop payments (or limit payments) to any correspondent foreign carrier that attempts to exercise this "last resort" option. Such a policy would leave many foreign

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8/ *See, e.g., AT&T Corp. Application for Authority under Section 214 of the Communications Act to Discontinue the Offering of High Seas Service,* Memorandum Opinion and Order, 14 FCC Rcd 13,225 (IB 1999) at ¶ 8 (granting a request to discontinue service where the Commission determined that "there would be a burden on AT&T if were we to require it to continue providing such service indefinitely").

9/ *Id*. at n.5 (citing Railroad *Comm'n v. Eastern Texas R.R. Co*., 264 U.S. 79 (1924); *Bullock v. Florida ex rel. Railroad Comm'n,* 254 U.S. 513 (1921)).

international carriers "caught in the middle" – squeezed on one side by higher traffic termination costs domestically, and on the other side by U.S. carriers unwilling and/or legally unable to pay the increased costs. The fundamental disconnect in this scenario is that the U.S. carriers are often not negotiating with and have no contractual privity with the fixed or mobile carriers terminating the traffic, where the higher costs often originate. As a consequence, the concerns of U.S. carriers and the Commission can only be properly addressed through government-to-government contact with the appropriate NRA that has jurisdiction over the terminating carriers, consistent with the Commission's prior statement of intent to rely on such contact.10/

The *NOI* also raised the possibility that new rules could permit the Commission to effect stop-payment orders based on mere *allegations* that a foreign international carrier threatened to disrupt or block circuits.11/ CANTO recommends against the adoption of such a policy. First, mere allegations of threatened or actual circuit-blocking from U.S. carriers are insufficient bases for Commission regulatory measures such as stop-payment orders, even where such measures are "interim." Second, "interim" measures that limit the amount of compensation paid to foreign carriers could have the effect of putting foreign carriers out of business. If the Commission ultimately determines that such measures were not justified, it may be difficult or impossible to correct the grave damage done to the relevant foreign carrier.

A proposal contemplated in the *NOI* that would prohibit all U.S. carriers from making increased settlement payments to any foreign carrier charged with circuit-blocking or threatened

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10/ *See ISP Reform Order* at ¶ 46 ("Because each controversy presents somewhat different circumstances, our first response to allegations of anticompetitive conduct in commercial disputes will be to consult with foreign regulators in coordination with appropriate Executive Branch agencies.")

11/ *See NOI* at ¶¶ 10-11 (asking whether the Commission should act immediately upon complaints – possibly without even requiring the U.S. carrier to put the complaint in writing).

circuit-blocking12/ would, if enacted, provide U.S. carriers with a significant unfair advantage in commercial negotiations with foreign international carriers. The implicit threat that a U.S. carrier could, by filing a complaint, effectively shut off from a foreign carrier revenues associated with all U.S.-originated traffic would be a powerful tool in negotiations. Apart from its "defensive" use contemplated by the Commission, it could also be used "offensively," making it more likely that the foreign carrier would accede to a particular U.S. carrier's demands in order to prevent a potential disruption of revenue from the remaining U.S. carriers. Such government-enabled negotiating leverage is precisely the type of unfair advantage that the *NOI* purports to be focused on preventing. As the Commission has recognized in other contexts, this type of government interference (whether active or only implicit) in commercial relationships is inappropriate for routes such as those between the U.S. and CANTO countries, which are benchmark-compliant and ISP-exempt.13/ On many CANTO country routes, a U.S. carrier has alternatives in the choice of correspondents, and can choose not to deal with any foreign international carrier threatening to disrupt circuits in order to extract higher settlement rates that are not justified by its own costs.14/

12/ *See NOI* at ¶ 11.

13/ *See Decreased Regulation of Certain Basic Telecommunications Services*, 2 FCC Rcd 645 (1987) ("[M]arket forces, rather than government intervention, can more easily and efficiently allocate resources and maximize benefits to users."); *EchoStar Communications Corp. v. Fox/Liberty Networks LLC*, Memorandum Opinion and Order, 13 FCC Rcd 21841 (CSB 1998) at ¶ 20 ("We believe that public policy requires that we avoid unnecessary regulatory interference regarding contracts entered into by consenting parties.").

14/ Moreover, U.S. carriers are free to establish their own international gateways in many CANTO countries, especially those where market opening commitments have been made under the WTO Agreement on Basic Telecommunications (GATS 4th Protocol).

III. Many Foreign Termination Rate Increases Are Justified Based on Costs or Legitimate Government Policies

As explained above, foreign international carriers often have little or no control over rising costs that result in requests for higher settlement payments from U.S. carriers. Therefore, CANTO disagrees with the assumption, either implicitly or explicitly underlying much of the *NOI*, that costs involved in international traffic termination should generally only decrease, not increase. The Commission itself has recognized "the possibility that, at some future date, U.S.-international termination rates may be substantially cost-based and subject to fluctuation, including increases that are based on increases in cost."15/ Similarly, in the U.S. domestic context, the Commission has recognized that various factors may cause a carrier's costs to rise.16/ Moreover, in some markets, prices for termination services can actually dip below cost in anticipation of market liberalization or technological advances. In such markets, it is natural for costs to increase over time as the market corrects itself and some providers of termination services that cannot earn a return under such conditions exit the market.

In particular, the Commission should appreciate that costs incurred by carriers in developing countries, such as the CANTO countries, do not necessarily track costs incurred by carriers in the U.S. and other large, more developed economies.17/ For example, carriers in

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15/ *ISP Reform Order* at ¶ 49 (declining to establish bright-line rule prohibiting increases over previously negotiated settlement rates).

16/ *See, e.g., Cost Review Proceeding for Residential Single-Line Business Subscriber Line Charge Caps*, Order, 17 FCC Rcd 10,868 (2002) (raising the cap on subscriber line charges after finding increases in the forward looking costs of providing voice-grade access to the PSTN); *Petition for Waiver Filed by Arapahoe Telephone Co., et al.*, Memorandum Opinion and Order, DA 96-1894 (CCB 1996) at ¶ 10 (predicting that "when some [ILEC network] upgrading is done their costs may rise").

17/ *See* Paula Uimonen, United Nations Research Institute for Social Development, "The Internet as a Tool for Social Development," *available at* www.isoc.org/inet97/proceedings/G4/G4_1.HTM (visited Oct. 5, 2005) (noting estimates that new telephones lines in Sub-Saharan Africa would cost more than three times that of lines in the rest of the world); *cf.* Economic

developing countries may face cost increases resulting from: a higher cost of capital; increases in labor costs; changes in political and country risk profile; exchange rate fluctuations; higher purchase, shipping and installation costs for equipment; higher insurance costs; higher network expansion costs due to adverse terrain and climactic conditions as well as smaller and less dense populations; higher costs due to less efficient and lower density network configurations; and higher costs due to fewer economies of scale/scope.18/ Thus, the Commission should not assume that requested increases in international settlement rates can never be cost-justified and therefore constitute *prima facie* evidence of "whipsawing" or anticompetitive conduct.

CANTO believes that each country's NRA has the responsibility to review the termination rates charged by its fixed and mobile operators and to take any actions necessary to ensure that those rates are adequately cost-justified. Indeed, the NRA is the *only* entity that commands the data, expertise and perspective necessary to establish the cost-oriented legitimacy of rates for a given country. By contrast, the Commission possesses neither the jurisdiction (*i.e.*, legal authority over terminating carriers) to acquire the necessary data, nor the resources to process that data for each foreign country.19/ There is no feasible means for the Commission to develop a

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Commission for Africa, "Strengthening Africa's Information Infrastructure," *available at* www.uneca.org/adf99/infrastructure.htm (visited Oct. 5, 2005) at § 3.2.3 (noting an ITU estimate that it would cost $6-8 billion to add only 4.5 million telephone lines in Africa).

18/ The failure of U.S. international carriers to recognize these substantially higher costs faced by carriers in developing countries contributes to the often intractable nature of commercial settlement rate negotiations, which in turns leads to the expenditure of scarce administrative resources as parties turn to government regulators to assist with the impasse.

19/ *See International Settlement Rates*, Report and Order, 12 FCC Rcd 19,806 (1997) at ¶ 117 (acknowledging that termination "costs may vary among some countries," and that "we lack the cost data to determine whether, and to what extent, costs vary from one end of a call to the other").

cost model that adequately takes into account all of the complexities associated with both fixed and mobile terminations20/ in scores of different countries.

Some cost increases are the result of government policy, including, for example, universal service assessments on international traffic revenue. The *NOI* questions whether such assessments are justified, given that U.S. law does not assess USF contributions on all international revenue.21/ CANTO does not take a position here on universal service policy other than to recognize that a foreign NRA could reasonably conclude that the benefits of universal service in its particular country accrue not only to subscribers in its country, but also to subscribers in the U.S. and other countries who, as a result of network improvements and expansions in the foreign country, become better able to communicate with persons in that country. The Commission should not require foreign governments to reach the same public policy conclusions as the U.S. (with regard to the level of assessments on international revenues or other issues) in order to avoid being branded anticompetitive. Moreover, the Reference Paper issued in conjunction with the WTO's Agreement on Basic Telecommunications allows for each country to define its own universal service policy. 22/

20/ The particularly complex analysis required to compute costs for mobile terminations has already been described by parties in the *Foreign Mobile Termination* proceeding, IB Docket No. 04-398. *See* Comments of Western Wireless International at 8-9; Reply Comments of NTT DoCoMo Inc. at 12; Comments of CTIA at 11; Comments of CANTO at 3.

21/ *NOI* at ¶ 13, n. 34 (For example, carriers whose interstate revenues comprise less than 12% of their combined interstate and international revenues only contribute to USF based on interstate revenues.).

22/ WTO Negotiating Group on Basic Telecommunications, Reference Paper (Apr. 30, 1996), reproduced at 36 I.L.M 367 (1997), at § 3 ("WTO Reference Paper").

IV. The Pleading Cycles Previously Established to Investigate Alleged Anti-Competitive Behavior by Foreign Carriers Should Not Be Shortened; No Action Should Be Taken Prior to Careful Review of Complaints

The *NOI* requests comment on whether the pleading cycles for "whipsawing" complaints should be shortened from ten days for comments and seven days for replies, to five days for comments and two days for replies.23/ CANTO opposes such a change. A shorter pleading cycle would make it much more difficult for foreign carriers and NRAs to participate meaningfully in these proceedings, given that these entities are less familiar with the Commission's administrative procedures and, unlike their U.S. counterparts, often have no pre-existing relationship with U.S. communications counsel who can assist with such filings. As referenced earlier, CANTO is also troubled by the prospect that the Commission could take action on complaints (including the possible issuance of stop payment orders) before affected parties have had an opportunity to comment and before the Commission has had time to consider the substance of the allegations raised in the complaint.24/ These procedural changes, if adopted, would raise serious questions of due process, transparency and equitable treatment. These procedural changes could also make the U.S. vulnerable to charges of non-compliance with the regulatory principles established in the WTO Reference Paper, as such a condensed pleading cycle raises questions regarding the Commission's "impartial[ity]" with respect to all market participants.25/

Moreover, the Commission has already established an expedited process for resolving allegations of anti-competitive activity on ISP-exempt routes. A further shortening of the applicable pleading cycle would make it virtually impossible for the Commission to satisfy its

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23/ *NOI* at ¶ 9.

24/ *NOI* at ¶¶ 10-11.

25/ WTO Reference Paper at § 5.

commitment, as expressed in the *ISP Reform Order*, to "evaluate the allegations and facts presented [by carriers alleging anti-competitive activity] on a case-by-case basis."26/ The expedited pleading process suggested by the Commission affords insufficient time for the data collection and thorough review necessary to resolve such allegations.

V. U.S. Consumers Are Not Realizing the Full Benefits of Settlement Rate Reductions

The *NOI* seeks comment on whether U.S. carriers are failing to reflect the benefits of lower settlement rates in their calling rates to U.S. customers.27/ As CANTO stated in the *Foreign Mobile Termination* proceeding, CANTO has observed that U.S. carriers have not been passing on reductions in termination rates to the Caribbean Region to their U.S. consumers.28/ Thus, before taking action to intervene in commercial negotiations in benchmark-compliant foreign markets, the Commission is encouraged to verify that carriers under its jurisdiction are doing their part to ensure that U.S. consumers are benefiting from the liberalization and greater competition in the provision of international telecommunications services that has developed in recent years.

CONCLUSION

For the reasons discussed above, CANTO urges the Commission to proceed cautiously before interfering with commercially-negotiated relationships between U.S. and foreign carriers on benchmark-compliant international routes such as the ones serviced by CANTO's members. Many of the possible policy changes raised in the *NOI* would result in unfair negotiating leverage

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26/ *ISP Reform Order* at ¶ 50.

27/ *NOI* at ¶ 12.

28/ CANTO Comments in IB Docket No. 04-398 (filed Jan. 14, 2005) at 3 (urging the Commission to adopt a policy that would prohibit U.S. carriers from "marking up" termination rates, much as the FCC has prohibited interexchange carriers from marking-up their universal service fund contributions).

for U.S. carriers, which CANTO recognizes is not the Commission's objective. CANTO recommends that concerns regarding the legitimacy of increases in international settlement rates be addressed to the appropriate NRA with jurisdiction to investigate and take corrective action should any anti-competitive behavior be identified.

Respectfully Submitted,

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